IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1226

VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
BRUCE LONG, CLAIMANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL M. GORA
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

WAYNE OUTTEN
40 Washington Square South
New York, New York 10012

Attorneys for Petitioner

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The petitioner, Bruce Long, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 15, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dismissing on constitutional grounds a forfeiture proceeding brought

against literature mailed to the petitioner-claimant from abroad, is reported at 433 F. Supp. 1132, and is set forth in the Appendix, infra, at pp. 1a-20a. The opinion of the United States Court of Appeals for the Second Circuit, reversing and remanding that decision, is reported at 562 F.2d 185, and is set forth in the Appendix, infra, at pp. 21a-36a.

JURISDICTION

The decision of the Court of Appeals was entered on September 15, 1977. A timely petition for rehearing and suggestion for rehearing en banc was denied by an order entered on November 2, 1977. (App., infra, p. 40a. On January 23, 1978, Mr. Justice Marshall entered an order extending the time for filing this petition to and including March 2, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case raises the following questions regarding the procedures and standards for determining whether materials seized by customs officials under 19 U.S.C. §1305 are obscene:

1. Whether requiring claimants of allegedly obscene materials seized by customs to journey to a far away, happenstantial port-of-entry district to defend their right to receive the material violates the First Amendment and the Due Process Clause of the Fifth Amendment?

2. Whether the appropriate community standards for determining the obscenity vel non of materials seized by customs officials are those of the port-of-entry district or those of the addressee's home district?

STATUTE INVOLVED

19 U.S.C. Section 1305 provides:

§1305. Immoral articles; importation prohibited.

(a) Prohibition of importation.

All persons are prohibited from importing into the United States from any foreign country any book,

pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: Provided, That the drugs hereinbefore mentioned, when imported in

bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: Provided further, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books when imported for non-commercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation and destriction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry

under the provisions of this section.

> In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT OF THE CASE

This case involves the constitutionality, under the first and fifth amendments, of the procedural regime by which the government administers and enforces 19 U.S.C. §1305, as it applies to the seizure, forfeiture, and destruction of allegedly obscene material imported from abroad. This case typifies the procedures used under that statute - procedures so onerous and burdensome that they, in effect, create a system of enforcement by default.

In September, 1975, the petitioner-claimant, Bruce Long, who lives in Lancaster, Pennsylvania, was mailed a pamphlet by a friend in West Germany. The pamphlet was seized by customs officials in New York under Section 1305 as allegedly obscene. (App., infra, p. 2a-3a). As they do every week,

customs officials compiled a schedule of items seized during the week; they sent it to the United States Attorney for the Southern District of New York, who instituted a forfeiture proceeding against the petitioner's pamphlet and the 573 other items listed on Schedule 1303 that were seized the previous week. (Id.) In almost every instance, the seized item was either "illustrated advertising" or a single copy of a magazine. The addresses for the seized items in Schedule 1303 resided all over the United States; all but two states were represented. 1/

Only 14 addressees filed an administrative claim and answer in response to the government's notice of the seizure and of the forfeiture proceeding. The items addressed to the other 559 addressees were ordered forfeited and destroyed by partial default judgment. As to all those items, there was never a judicial finding of obscenity - only the administrative action that resulted in the seizure. Only one claimant - petitioner

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1/ A map showing the geographical distribution of the addressees is set forth in the Appendix, infra, at p. 41a.

Long, acting pro se, - appeared at the hearing scheduled to determine whether the seized items were obscene. The items addressed to 12 other claimants, none of whom appeared, were found obscene by the District Court in an uncontested proceeding and were ordered condemned. (App., infra, p. 25a).[2/]

Petitioner Long testified at the hearing that, under the community standards prevailing in Lancaster, Pennsylvania, he would be entitled to receive the allegedly obscene pamphlet; this evidence was uncontradicted at trial. (App., infra, p. 8a). He introduced evidence that, after Miller v. California, 413 U.S. 15 (1973), the Mayor of Lancaster set up a commission of local citizens, of which the petitioner was a member, to formulate community standards for obscenity. Under the commission's report, no governmental restriction of allegedly obscene materials is justified in Lancaster except to protect children and to prevent obscene materials

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2/ The United States Attorney's office released the materials addressed to a California gynecologist after he represented in a letter that he intended to use them for sexual counseling. (App., infra, p. 25a).

being thrust on unwilling members of the public. Since that report, adults in Lancaster have had unimpaired access to allegedly obscene materials, and numerous "adult" bookstores sell materials similar to the pamphlet the petitioner claims here. (App., infra, p. 8a).

In August, 1976, the district court (Honorable Marvin E. Frankel) entered an opinion holding that the procedural regime for enforcing Section 1305, under which forfeiture proceedings are held in the happenstantial port-of-entry district, violates the first amendment in two respects: "in (a) depriving claimants and their local communiities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and expensive procedure for the vindication of First Amendment claims to items seized." (App., infra, p. 19a). The district court holding thus had two elements, first, that as a matter of substantive first amendment law, the obscenity vel non of material seized under Section 1305 had to be determined by the standards of the addressee's community, where the material

would be used, rather than the happenstantial port-of-entry where it was seized, and, second, that as a matter of procedural first amendment protections, requiring that issue to be adjudicated in the port-of-entry district was impermissibly burdensome. The district court therefore dismissed the government's complaint against the pamphlet claimed by petitioner Long on both grounds: the government failed to prove the pamphlet obscene under the community standards of Lancaster, and the government failed to notify claimant Long of his constituitonal right to have the proceeding transferred to the district of his residence.

The government appealed, and petitioner Long urged the Second Circuit to affirm the district court on both grounds. That court's decision, however, dealt primarily with the

first issue, namely, what are the appropriate "community standards" for judging the obscenety of seized material. The Court of Appeals held (1) that the procedures used in this case were consonant with the statute; (2) that the community standards for determining the obscenity vel non of materials seized under section 1305 did not have to be those of the addressee's home community, but could be those of the port-of-entry community in which the materials were seized, here, New York; and (3) that this result was permissible in light of the "plenary power" of Congress to prohibit importation of obscene materials from abroad. (App., infra, pp. 28a-31a).

Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on November 2, 1977. 3/

3/ The order of the Second Circuit reversed the District Court's dismissal of the forfeiture proceeding and remanded the action to the District Court "for further proceedings in accordance with the opinion" of the Court of Appeals. (App., infra, p. 34a). Presumably, the only issue on such a remand would be the obscenity vel non of the particular pamphlet under the community standards of the Southern District of New York. Given the nature of the

(continued on next page)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals upholding the Section 1305 procedures conflicts with numerous decisions of this Court requiring strict procedural safeguards to protect First Amendment rights.

The record in this case demonstrates that the procedures in a Section 1305 forfeiture proceeding are so onerous that few persons contest the proceeding and virtually none appear at the hearing. This pattern is repeated every week in the Southern District of New York[4/] and in every port-of-entry

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issues resolved by the Second Circuit and raised in this petition, the possible availability of such a narrow question in the District Court does not deprive the Second Circuit decision of the requisite finality to warrant review by this Court at this time. See New Orleans v. Duke, 427 U.S. 297, 301-303 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-487 (1975).

4/ The following data were gleaned from a random sampling of ten such proceedings in that district during 1975 and 1976. In the ten proceedings, 1711 seizures were listed, an average of 171 a week. The addressees resided all over the country. Only 100 persons filed claims and answers, an average of 10 a week, representing about 6% of the total seizures. Of the 1711 seizures, not one person appeared at the scheduled hearing.

district. According to the Customs Service, customs officials at the United States port-of-entry made about 30,000 seizures of allegedly obscene materials in 1975 and 1976. Thus, thousands of people have their First Amendment rights unilaterally determined by administrative officials because it is prohibitively burdensome for them to journey to the port-of-entry to examine their seized property, to obtain counsel, and to appear - all to contest the administrative claim that a brochure or magazine addressed to them is obscene. The procedural regime for enforcing Section 1305, as reflected in the record of this case, is essentially a system of defaults, where, in almost every case, the censor's determination on obscenity goes unchallenged and hence undisturbed.

During the last several years, this Court has recognized that the procedures used by government officials to enforce Section 1305 affect the constitutional rights of many thousands of Americans every year and that those procedures warrant careful scrutiny. See United States v. Thirty Seven (37) Photographs, 402 U.S. 363 (1971); United States v. Ramsey, 431 U.S. 606 (1977). In the instant

case, the Court should examine the difficult and unreasonable barriers that the existing procedures create for persons who want to defend their seized property, which is presumably protected by the First Amendment.

This Court has often held that not only may Congress not substantively abridge First Amendment rights, but it may not authorize or establish procedures that unduly impair those rights. E.g., Manual Enterprises, Inc. v. Day, 370 U.S. 478, 497 (1962). To the extent that Section 1305 procedures violate the First Amendment, the section should have been declared unconstitutional or construed to comport with the constitutional requirements. The procedural regime of Section 1305 is incompatible with the principles and holdings of numerous decisions of this Court requiring strict procedural safeguards to protect First Amendment rights.

Any system of prior restraints, such as Section 1305 seizures and forfeitures, bears "a heavy presumption against its constitutional validity," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), and "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the

dangers of a censorship system." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975); accord, Blount v. Rizzi, 400 U.S. 410 (1970). The procedures under Section 1305, rather than obviating the dangers of a censorship system, aggravate them. Those procedures reflect callous disregard for First Amendment rights; they are far more burdensome than necessary to achieve governmental objectives; less drastic means, discussed by the district court below, exist to achieve the government's customs objectives.

The most important procedural safeguard in any system of prior restraints is assurance of a prompt, independent, judicial determination. Freedman v. Maryland, 380 U.S. 51, 58 (1965). See also Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970). A prompt judicial determination is especially important in obscenity cases because non-judicial censors may well be less responsive than a court to protecting First Amendment rights. Freedman, 380 U.S. at 57-58.

A proper judicial determination on obscenity can come only through an adversary proceeding in which the person whose First Amendment rights are involved has an oppor-

tunity to participate. Southeastern Promotions, 420 U.S. at 559-560; A Quantity of Books v. Kansas, 378 U.S. 205 (1964). Further, the opportunity to be heard must be granted at a "meaningful time and in a meaningful manner." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). But under Section 1305, the only opportunity to be heard for claimants all over the United States is at the port-of-entry, that is, New York. In this context, this is not a "meaningful" opportunity for an adversary hearing at which the claimant can defend his seized property. Practically, the right to a judicial determination, based on an adversary proceeding, is patently illusory; few people have a realistic opportunity for an adversary hearing. The record here illustrates that, as this Court said, "if judicial review is made unduly onerous, by reasons of delay or otherwise, the [censor's] determination in practice may be final." Southeastern Promotions, 420 U.S. at 561 (emphasis added); Freedman, 380 U.S. at 58; see Thirty-Seven Photographs, 402 U.S. at 387 (Justice Black dissenting).

Moreover, these unconstitutional burdens are imposed notwithstanding that

"less drastic means" exist for the government to achieve its objectives under Section 1305 without depriving claimants of their right to a meaningful opportunity for a judicial determination on obscenity. As the district court found, the government could simply allow the Section 1305 claimant to have the forfeiture proceeding transferred to his home district where he could examine the seized item, determine whether to contest the seizure, hire counsel, and personally attend the hearing. The district court's decision was a careful and modest attempt to meet the section's constitutional defects. In practice, probably few claimants would take advantage of the right, but the First Amendment requires that they be afforded the opportunity. Just as the Court imposed strict time requirements on the enforcement procedures of Section 1305 in United States v. Thirty Seven (37) Photographs, supra, so too should the Court in this case grant review to bring the statutory procedures into conformity with constitutional principles.

2. The decision of the Court of Appeals is in conflict with this Court's decision in Shaffer v. Heitner.

The decision of the Court of Appeals is inconsistent with and overlooks constitutional principles recently enunciated by this Court in Shaffer v. Heitner, ___ U.S. ___, 53 L.Ed. 2d 683 (1977). There, the Court changed the standards for determining whether a state has the power to adjudicate personal rights to property located in the state. The Court of Appeals' decision upholding the procedures here is inconsistent with the principles announced in Shaffer.[5/]

Before Shaffer, in rem proceedings were based on the premise that a proceeding against property was not a proceeding against the owner of the property, and could therefore be brought against property wherever it could be found. The Court in Shaffer changed all that by recognizing that "jurisdiction over a

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5/ Shaffer was decided after petitiner's brief was submitted to the Court of Appeals but before the Court of Appeals issued its decision. That decision did not discuss the implications of Shaffer, and the Court of Appeals denied petitioner's motion for a rehearing to consider, among other things, those implications.

thing" is an elliptical way of referring to "jurisdiction over the interests of persons in a thing." 53 L.Ed. 2d at 699. "The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in International Shoe." 53 L.Ed.2d at 700. Under Shaffer, therefore, the mere presence of property in a jurisdiction, though relevant to the existence of the required minimum contacts, does not conclusively establish jurisdiction over the property.

The Shaffer principles are applicable here. Under the existing Section 1305 procedures, the in rem forfeiture proceedings take place entirely in the port-of-entry district, merely because the seized property happened to be passing through that port. The claimant who lives outside the port-of-entry district usually will have no contacts whatever with that district. And the fact that the controversy is over the seized property itself does not add to the "contacts" with that district, because the claimant generally never asked for or expected his property to be there. In these circumstances,

it is a denial of "fair play and substantial justice," 53 L.Ed.2d at 702, to require a Section 1305 claimant to journey to a distant jurisdiction to defend his property, particularly when that property is presumptively protected by the First Amendment and when less drastic means are available to serve the government's interests.

3. The Court of Appeals' extreme deference to Congress' power over foreign commerce is inconsistent with decisions of this Court.

The Court of Appeals' decision improperly relied on the "plenary power" of Congress over foreign commerce in sustaining the §1305 procedures.

Running throughout the opinion is the theme that, since §1305 deals with materials from abroad, Congress had greater leeway in the procedures that it provided to regulate such materials. That ruling is inconsistent with at least two of this Court's decisions holding that Congress may not exercise its foreign commerce power through procedures that unduly burden First Amendment rights. In Lamont v. Postmaster General, 381 U.S.

301 (1965), the Court invalidated procedures, established under Congress' postal powers, that made it difficult in practical terms for American addressees to receive political propaganda from abroad. More relevantly, in United States v. Thirty-Seven (37) Photographs, the Court held that §1305 itself would be constitutionally infirm if not construed to require strict time limits in obtaining a judicial decision on the obscenity of material sought to be imported. Congress may have broad power to prohibit the importation of obscene material, but the methods by which it exercises that power must be subjected to the closest scrutiny, an inquiry which was not undertaken below.

4. The decision of the Court of Appeals is in conflict with the principles inherent in this Court's decisions on the applicable community standards for determining obscenity.

Although this Court has written numerous opinions on the applicable community standards for determining obscenity, this case raises an issue never explicitly addressed by this Court. The decisions heretofore have dealt with the

size of the applicable community on a scale ranging from the town, to the district, to the state, to the nation. No decision of the Court has dealt with the situation in which two totally separate communities are involved and the issue is which community's standards are applicable. Here, the district court held that the proper community standards for determining the obscenity of an article seized under §1305 are those of the community to which it is addressed, rather than those of the district in which it happened to be seized. The Court of Appeals incorrectly held that the standards of the latter district were applicable.

Since Roth v. United States, 354 U.S. 476 (1957), this Court has frequently had occasion to discuss whether "national" or "local" community standards should be applied in determining whether something is obscene. One of the principal concerns in those cases has been to identify the standard that would best protect and encourage diversity of tastes among the nation's many communities. Thus, in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962), the plurality opinion endorsed a national standard because local standards would have "the intolerable conse-

quence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." Likewise, in Jacobellis v. Ohio, 378 U.S. 184, 194 (1964), the plurality opinion endorsed a national standard because "to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene. . . ."

The local standard ultimately prevailed in Miller v. California, 413 U.S. 15, 32-33 (1973), at least partly because the Court concluded that a local standard most effectively permits and encourages diversity. See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973), and Hamling v. United States, 418 U.S. 87, 107-07 (1974).

The Miller Court, however, set up national baseline requirements. Accordingly, no materials can be declared obscene, and therefore unprotected expression, unless they lack "serious literary, artistic, political, or scientific value," id. at 24, and unless they are "hard core" pornography, id. at 25-27. If, and only if, those national baseline requirements are met, the materials may

be declared obscene under local community standards. But local communities are free to allow greater latitude for expression.

Thus, a central purpose of the local community standards rule is to assure that a community that is tolerant toward "obscenity" is not denied materials because some other communities are less tolerant. Id. at 32, n. 13. But if, as the Court of Appeals held here, the standards used in a §1305 forfeiture proceeding are those of the district of seizure, a few happenstantial ports-of-entry would become the arbiters of taste and decency for recipients of mail everywhere. That result is comparable to having a discredited national standard that stifles diversity. A construction of §1305 that permits such a result is inconsistent with this Court's decisions.

The facts here illustrate the danger of having ports-of-entry dictate acceptable expression. As District Judge Frankel found, there is "substantial (and uncontradicted) evidence that the community standard defining obscenity in Lancaster is far more stringent, i.e., libertarian, than that in New York. Under Lancaster's standards, it seems that

nothing is to be outlawed as obscene that is (1) viewed by an adult in private, and (2) not offered or purveyed to children." Despite that tolerant view,[6/] the claimant, a resident of Lancaster, is threatened with forfeiture of his presumably protected material under the less tolerant standards of New York. If Lancaster happened to be an international port-of-entry, the claimant might be able to import the seized merchandise without hinderance. Constitutional rights should not turn on such happenstance.

6/ This Court's recent decision in Smith v. United States, 431 U.S. 291 (1977), is not dispositive here. Unlike Smith, this case does not involve a contention that the government may not proceed solely because the material at issue is acceptable under locally-established community standards on obscenity. Petitioner Long does not contend that the report of Lancaster's mayoral commission on obscenity standards precludes the possiblity that the pamphlet at issue here could be found obscene by a Lancaster jury. But that report is relevant evidence of Lancaster's tolerant view, and it suggests that there is a real possibility that Lancaster standards are more tolerant than those of the port-of-entry.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL M. GORA
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

WAYNE OUTTEN
40 Washington Square South
New York, New York 10012

Attorneys for Petitioner

March 2, 1978

APPENDIX

Filed Aug 25 '76 U.S.D.C. S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE NO. 1303,

Defendant.

75 Civ. 4691

OPINION

A P P E A R A N C E :

BRUCE A. LONG, Pro Se
P.O. Box 26
Lancaster, Pa. 17604
STEVEN RAAB, ESQ.
Of Counsel

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York
New York, N.Y.
Attorney for Plaintiff
William R. Bronner, Assistant United States Attorney

FRANKEL, D. J.

For 135 years, Congress has forbidden penetration of our shores by obscene materials. [1] The enactment currently performing that protective function is §305 of the Tariff Act of 1930, 19 U.S.C. §1305(a)(1970). [2] Customs personnel at

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[1] Statutes dating back to 1842 have, in one form or another, forbidden obscene imports. See, e.g., Act of August 30, 1842, c.270, §28, 5 Stat. 566; Act of March 3, 1883, c. 121, §§ 2491-2493, 22 Stat. 489-490.

[2] 19 U.S.C. § 1305(a) provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, * * * or other article which is obscene or immoral * * * . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles * * * were inclosed therein without the knowledge or consent of the importer * * *, the entire contents of the package * * * shall be subject to seizure and forfeiture * * *.
>
> "Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district

(continued)

our various ports staff this bulwark. They spend their time opening mail and packages, having evidently learned what to suspect. Materials believed to be of the forbidden kind are turned over to the United States Attorney for the district in which the port lies.

In this district, the Customs Service makes a weekly bundle of the allegedly obscene items, which are then listed on a schedule and proceeded against by the United States Attorney's complaint in rem. The addressees receive notice that their mail has been opened and potentially condemned, and that they are entitled to claim it. Most ignore the notices, and their things are consigned by default to be destroyed.

If a claim is filed, it is set down to be "heard." On the day noticed for

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Court as hereinafter provided * * * . Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed * * * ."

the hearing, a judge of the court turns up to preside. There is present an Assistant United States Attorney, an expert from Customs just in case, and usually no one else. (In over 10 years on this court, this incumbent has seen two exceptions before the instant case.)[3] With nobody present to quarrel, the judge solemnly inspects the "claimed" postal cards, photos, brochures, and the like, intones a finding, inter alia, that each "work, taken as a whole, appears to the prurient interest," Miller v. California, 413 U.S. 15, 24 (1973), and sustains the Government's complaint.

In the extraordinary case now before the court, for reasons that may include at least some suited to our Bicentennial Year, the 29-year-old claimant hied himself here from Lancaster, Pennsylvania, on the appointed day and demanded delivery of the magazine intercepted on its way to him from a friend in Germany. Appearing pro se and waiving a jury, he presented the few undisputed facts which are now found to raise issues of some consequence. At the court's suggestion,

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[3] Like today's case, the two prior instances of actual contest posed substantial issues of constitutional law. United States v. One Book Entitled "The Adventures of Father Silas," 249 F.Supp. 911 (S.D.N.Y. 1966); United States v. Articles of "Obscene" Merchandise, 315 F.Supp. 191 (S.D.N.Y. 1970)(three-judge court), appeal dismissed, 400 U.S. 935 (1970), 403 U.S. 942 (1971).

he thereafter procured some assistance from an attorney in Lancaster for the writing of a brief. The proceedings became prolonged, mostly because of delays incurred in plaintiff's and the court's work, government counsel having been diligent, prompt, and helpful throughout. Because both sides were interested in a reasonably deliberate decision, the usual requirement of speed in such matters was waived.[4]

I

Claimant attacks at the threshhold the opening by Customs agents of his "first-class mail"[5] without prior judicial approval. Government counsel duly informs us that the Court of Appeals for the District of Columbia Circuit has lately issued a powerful opinion, though over a dissent, outlawing warrantless searches by Customs agents of letter-class mail arriving from abroad. United States v.

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[4] In United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 367 (1971), the Supreme Court held that forfeiture proceedings under 19 U.S.C. §1305(a) must be commenced within 14 days of seizure and a judicial determination made within 60 days thereafter.

[5] The quoted characterization of the magazine has been used by the claimant and not disputed. Whether it is literally accurate as a matter of postal lore is not significant here.

Ramsey, ___ F.2d ___ (1976). As that Court observes, especially tellingly in the climate of our times, the values of both the First and the Fourth Amendments are implicated in troublesome fashion by the unchecked practice of border agents in opening letters as well as packages mailed here from overseas.

On the other hand, until that recent decision, a substantial body of federal authority stood for a contrary view. The courts considering the issue had held that the standard, if it could be called that, for opening foreign mail is that of a border search. See, e.g., United States v. Doe, 472 F.2d 982 (2d Cir.), cert. denied, 411 U.S. 969 (1973); United States v. Beckley, 335 V.2d 86 (6th Cir. 1964), cert. denied, 380 U.S. 922 (1965); Hogan v. Nebraska, 402 F.Supp. 812 (D. Neb. 1975); United States v. Various Articles of Obscene Merchandise, Schedule No. 896, 363 F. Supp. 165 (S.D.N.Y. 1973). That view has been applied to letters coming from abroad. United States v. Bolin, 514 F.2d 554 (7th Cir. 1975); United States v. Barclift, 514 F.2d 1073 (9th Cir.), cert. denied, 423 U.S. 842 (1975). Although our Circuit has not specifically applied this holding to letter-class foreign mail, there has been dictum at the Circuit level and a holding of this court in line with the weight of precedent. See United States v. Doe, supra, at 984-985; United States v. Swede, 326 F.Supp. 533 (S.D.N.Y. 1971).

The broad question may be destined for resolution soon by the Supreme Court; the Government is seeking certiorari in United States v. Ramsey, supra. As with otherissues in the instant case, the

claimant's limited resources have afforded less than the intensive briefing the court would desire on this one. Our factual record is sketchy and far from ideal. This court is not prepared, in all candor, to add to the pertinent learning in the decisions of higher courts. In the circumstances, and since the claimant is hereinafter held to prevail on the more central and specific questions of this case relating to the receipt of allegedly obscene materials, the general propriety of opening letter-class mail from abroad may be bypassed at this level for present purposes.

II.

We come to the question of the applicable standard for determining obscenity, and whether the Government has sustained its burden of proof in this aspect.

In a forfeiture proceedings under 19 U.S.C. §1305(a), it is the Government's burden to prove by a preponderance of the evidence that the detained material is obscene. See United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella," Sherpix, Inc., 369 F. Supp. 1082, 1084 (E.D.N.Y. 1972), aff'd, 491 F.2d 956 (2d Cir. 1974); United States v. One Carton Positive Motion Picture Film Entitled "Technique of Physical Love,"314 F.Supp. 1334, 1335 (E.D. La. 1970). While that burden remains undischarged, the matter is presumptively embraced by the First Amendment. Before deciding whether the

Government has satisfied its burden here, two threshold issues must be resolved: (A) which community's standards are to be applied in making the obscenity determination, and (B) if the applicable standards are not those prevailing in this judicial district, whether this court or a jury drawn from this district should make the requisite finding.

A. Applicable Community Standard

The claimant, among his other interesting attributes, was once a member of the Lancaster Mayor's Committee on Community Standards on Pornography. Whatever New Yorkers may prefer to believe, secretly or otherwise, he presented substantial (and uncontradicted) evidence that the community standard defining obscenity in Lancaster is far more stringent, i.e., libertarian, than that in New York. Under Lancaster's standards, it seems that nothing is to be outlawed as obscene that is (1) viewed by an adult in private and (2) not offered or purveyed to children. [6] Thus, while this court -

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[6] The claimant also testified that material closely resembling his seized magazine, or even more candid materials, are available on the newsstands and bookstores in Lancaster. "[T]he availability of similar materials in the community" does not establish the nonobscenity of claimant's magazine. Hamling v. United States, 418 U.S. 87, 125-26 (1974). However, their availability, along with the announced policies of the community, may be some evidence of pertinent attitudes in Lancaster.

bound in time and place and person - might conclude that no American jury could find the material in question other than obscene, that is scarcely a permissable mode of disposition under the precedents. The question of obscenity vel non, once the constitutional threshold is passed,[7] is one of fact, to be answered by local

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[7] At least for purposes of criminal prosecution, only materials that "depict or describe patently offensive 'hard core' sexual conduct" may be determined to be obscene. Jenkins v. Georgia, 418 U.S. 153, 160 (1974), quoting Miller v. California, 413 U.S. 15, 27 (1973). Hard core sexual conduct includes "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id. at 25. Claimant's mail falls within this category. Thus, a trier of fact, applying the relevant community standard, would be permitted constitutionally, but not required, to find obscenity as a matter of fact.

community standards.[8] See Miller v. Califfornia, 413 U.S. 15, 30 (1973); Jenkins v. Georgia, 418 U.S. 153, 159 (1974). The diverse and far-flung communities of the United States may set standards within constitutional limits for defining obsenity. But they are free to be less inhibited and inhibiting than the Constitution would allow. See, e.g., Paris Adult Theatre I v. Slaton, supra, 413 U.S. at 64; Roth v. United States, 354 U.S. 476, 505-06 (1957)(Harlan, J., dissenting).

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8 Whether material can be obscene "as a matter of law" is open to dispute. Cf. United States v. Friedman, 528 F.2d 784, 789 (10th Cir. 1975) (obscene even under the standards of "ancient Sodom and Gomorrah"). An affirmative answer to that question would be difficult to square with the Supreme Court's insistence upon local standards, including standards opposed to "all controls * * *." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973). See Note, Community Standards, Class Actions, and Obscenity under Miller v. California, 88 Harv. L. Rev. 1838, 1845-46 n.49 (1975). In any event, this court cannot say with the requisite certainty that a community favoring access by its adults to any material of their choosing, as claimant's community does, would find that the mail in dispute here depicts sexual conduct in a "patently offensive way" or that the "work, taken as a whole, appeals to the prurient interest."

Although Miller and its progeny make local standard controlling, they do not tell us which community's standards are to be applied. See, e.g., United States v. Friedman, 488 F.2d 1141 (10th Cir. 1973); Schauer, Obscenity and Conflict of Laws, 77 W. Va. L. Rev. 377 (1975); Comment, Government Seizures of Imported Obscene Matter: Section 305 of the Tariff Act of 1930 and Recent Supreme Court Obscenity Decisions, 13 Colum. J. of Trans. L. 114 (1974). We do know that they may not be national standards, even when a federal statute is involved. See Hamling v. United States, 418 U.S. 87 (1974). We also know that juries may be instructed to "apply 'community standards' without specifying what 'community'." Jenkins v. Georgia, 418 U.S. 153, 157 (1974), or instructed more pointedly to apply a statewide or other, narrower geographical standard. Id. Finally, we have been told that the Constitution allows a single judge to make the community judgment, see Alexander v. Virginia, 413 U.S. 836 (1973), even though a jury "represents a cross-section of the country and has a special aptitude for reflecting the view of the average person." McKinney v. Alabama, ___ U.S. ___, ___ (1976) (Brenna, J., concurring), quoting Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448 (1957) (Brennan, J., dissenting). See United States v. One Reel of 35 mm Color Motion Picture Entitled "Sinderella," Sherpix, Inc., 491 F.2d 956, 958 (2d Cir. 1974).

Predictably, there has been no consensus among the lower federal courts as to which community's standards Miller meant to tap. There is growing support

for the view that a federal court may invoke the community standards of the district in which it sits and from which it draws a jury. See United States v. Marks, 520 F.2d 913, 919 (6th Cir. 1975), cert. granted, ___ U.S. ___ (1976). United States v. Various Articles of Obscene Merchandise, Schedule No. 896, 363 F. Supp. 165, 167 (S.D.N.Y. 1973); United States v. Miscellaneous Pornographic Magazines, 400 F. Supp. 353, 354 (N.D. Ill. 1975). Cf. United States v. One Reel of 35mm Color Motion Picture Entitled "Sinderella," Sherpix, Inc., supra, 491 F.2d at 958. It is clear, however, that evidence of community standards outside the judicial district may also be considered. See, e.g., Hamling v. United States, supra, 418 U.S. at 106; United States v. Marks, supra, 520 F.2d at 919. Finally, there is precedent and scholarly support for the proposition that the standard should be selected according to the nature of the alleged violation. Thus, if a defendant is charged under 18 U.S.C. §1461 with mailing allegedly obscene material into a given district, "the contemporary standards, as to obscenity * * * [should be those of] the area of the distribution of material * * *." United States v. Elkins, 396 F.Supp. 314, 316 (C.D. Calif. 1975). See also United States v. Slepicoff, 524 F.2d 1244, 1249 (5th Cir. 1975); Schauer, supra, at 398. This latter view would seem to achieve the aim of Miller to allow the States to adopt varying standards as to the nature of material they will allow within their borders.

Since the States are free to "follow * * * a 'laissez-faire' polity and drop all controls on commercialized obscenity, if that is what they prefer," Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973), and since individuals are allowed to possess even patently obscene materials in their own homes, see Stanley v. Georgia, 394 U.S. 557 (1969),[9] it is anomalous to allow a few port of entry community standards to dictate what citizens of other communities may read and see. There is no federal standard of obscenity; there are only local community standards. The question is one of local morality, of variegated community attitudes; it touches aspects of thought and feeling in which

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[9] The right to possess obscene materials in one's home does not carry with it a right to receive those materials. See United States v. Orito, 413 U.S. 139, 141 (1973); United States v. Reidel, 402 U.S. 351, 355 (1971). But that is not the issue here. Obscenity now is only in the eye of the beholder, the "community beholder" as it were. Thus, barring mail under the standards of some "alien" community may prevent a community with freer standards from receiving materials it would not deem obscene. The latter community and its citizens do not assert a right to receive obscene materials, but rather materials they authoritatively characterize as nonobscene.

free people are expected to be diverse, to experiment, and to choose for themselves. Roth v. United States, 354 U.S. 476, 503-506 (1957) (Harlan, J., dissenting). The several purposes served by our customs laws are not thought to include the imposition of a "blanket ban" or a "deadening uniformity," id. at 506, upon the whole Nation by allowing a happenstantial port of entry to become the arbiter of taste and decency for recipients of mail everywhere. If such an opporession were deemed to have been intended by the Congress, it would raise momentous questions under the First Amendment. But it does not appear - it is surely not necessary to conclude - that this was purposed.

For reasons touched thus far, and upon related grounds to be addressed, the sensible reading of §1305(a), avoiding constitutional doubts, is to promote and allow determinations of obscenity under the standards of the community to which the questioned mail is addressed.[10]

B. The Appropriate Fact-Finder

Compelled to come to New York to demand his mail, the claimant could have demanded a jury. But it would have been a New York jury. Conceivably, it, like the court, could have tried to understand and apply the standards of Lancaster, Pennsylvania. But that would be at best a dubious enterprise. The central point of the local community standard is that it is capable of fully effective application only by a person from the community who "is entitled

to draw on his own knowledge of the views of the average person in the community or vicinage * * *." Hamling v. United States, 418 U.S. 87, 104 (1974). See also United States v. Elkins, 396 F. Supp. 314, 318 (C.D. Calif. 1975). It contradicts the basic premise of this standard to have people from one community purport to go by the sentiments of another.

The test of obscenity under Miller is essentially a question of fact to be determined by "the average person, applying community standards." 413 U.S. at 30. National standards were rejected, inter alia, because "it would be unrealistic to require that the answer be based on some abstract formulation * * *. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility." Id. The futility is more vivid if we posit, as the Supreme Court commands, uniquely felt local attitudes, and then expect these to be assimilated and applied by people from other places, with other feelings and attitudes.

There is no need now to doubt that the Government may discharge its burden to prove obscenity under the applicable local standards in an uncontested case by merely offering up the seized materials for inspection by "foreign" fact-finders. The case is wholly altered when, as here, a claimant comes forward with undisputed evidence that his mail would not be branded obscene by his own community. The principled solution for all concerned is to refer disputes of this nature to the

district of the claimant's residence.[11] This would at the same time serve the end

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[11] There is some question as to whether an in rem action may be transferred to another district under 28 U.S.C. §1404(a), compare Torres v. The Rosario, 125 F. Supp. 496 (S.D.N.Y. 1954) (in rem action can be transferred), mandamus denied, 221 F.2d 319 (2d Cir.), cert. denied, 350 U.S. 836 (1955), with Clinton Foods v. United States, 188 F.2d 289 (4th Cir.), cert. denied, 342 U.S. 825 (1951). But this is not a problem if, as this court ultimately concludes, the choice of venue must be given to the recipient of the questioned mail.

The Government suggests that transfer is impossible because Customs officials are not authorized to allow contraband to "enter" the country. But the notion of an "entry" is not so narrowly phsyical. Even a person may not accomplish a meaningful "entry" for purposes benefitting him because he has been allowed to cross our border. Shaughnessy v. Mezei, 345 U.S. 206, 213, 215 (1953); United States v. Glaziou, supra, 402 F.2d at 12. On reasoning still more comfortable, a piece of mail has no more "entered" if it is held for adjudication in Lancaster than it has when it is so detained in New York City for purposed of 19 U.S.C. §1305(a).

of elementary procedural fairness, a point that merits separate treatment.

III.

The schedule of items libeled in this case lists very few recipients who live near or in this district. Most of this mail was destined for such faraway places as Rigby, Idaho, Honolulu, Hawaii, Daisy, Tennessee, Big Spring, Texas, Newport Beach, California, and Anchorage, Alaska. The things seized are characteristically of trivial monetary value. The burden and expense of coming here to press a claim are altogether disproportionate, as is illustrated by the case of the one claimant now before the court.

Any freedom is by definition impaired when its exercise is made costly and troublesome. The relevance of this proposition to First Amendment freedoms is familiar and obvious. See, e.g., Freedman v. Maryland, 380 U.S. 51, 59 (1965). Any system of prior restraint, such as that permitted by 19 U.S.C. § 1305(a), "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). "Because the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one," Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975), the system of restraint "cannot be administered in a manner which would lend an effect of finality to the censor's determination * * *." Freedom v. Maryland, supra, 380 U.S. at 58. Without appropriate procedural "safeguards, it may prove

too burdensome to seek review of the censor's determination. Id. at 59. See also Speiser v. Randall, 357 U.S. 513, 521-526 (1958). The quoted principles have plain application here. If it needs empirical demonstration, the experience of this court (undoubtedly typical) supplies it. Almost nobody shoulders the burden of a contest when his mail is opened, kept, and placed upon one of the condemning schedules.

Again, the vice in the procedure is curable, or at least mitigated, by referring contested claims to the district of the claimant's residence, or at least giving the claimant the option of having the matter heard there.

IV.

This case has made vivid and concrete some problems under 19 U.S.C. §1305(a) which do not appear, in the reported decisions of which the court is aware, to have been squarely considered before.[12]

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[12] Although the issue of unreasonably burdensome procedures has been presented in two cases within the court's knowledge, see Untied States v. Articles of "Obscene" Merchandise, 315 F.supp. 191, 193 (S.D. N.Y.) (three-judge court), appeal dismissed, 400 U.S. 935 (1970), 403 U.S. 942 (1971); United States v. One Book Entitled "The Adventures of Father Silas," 249 F. Supp. 911, 913 n. 3 (S.D.N.Y. 1966), it was not reached in either.

Upon the record and the legal doctrines outlined above, the procedure under the statute is found to offend against the First Amendment both in (a) depriving claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and expensive procedure for the vindication of First Amendment claims to items seized. The invalidity of the procedure could have been eliminated, and can be in the future, by stating in the notice to potential claimants that they have a right to have the issues heard in the district of their residence or of the destination of the mail matter. Because the claimant was not given this choice, or, of course, any notice of such a choice, his claim should be sustained without reaching the merits of the issue of obscenity. See, e.g., Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 562; Freedman v. Maryland, supra, 380 U.S. at 60; United States v. One Book Entitled "The Adventures of Father Silas," 249 F. Supp. 911 (1966).

Alternatively, the claimant would prevail because the Government has failed to sustain the burden of proving the material obscene within the local community standard of Lancaster, Pennsylvania.

The complaint is dismissed as against this claimant. The magazine he demands should be delivered to him within 30 days unless the Government before then files

a notice of appeal, in which event, subject to the orders of the Court of Appeals, this order is stayed pending expeditious prosecution of such an appeal.

It is so ordered.

Dated, New York, New YOrk
August 25, 1976

[Marvin E. Frankel]
U.S.D.J.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 749—September Term, 1976.

(Argued May 17, 1977 Decided September 15, 1977.)

Docket No. 76-6152

UNITED STATES OF AMERICA,

Appellant,

—against—

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE No. 1303,

Appellee.

Before:

MOORE, SMITH and MULLIGAN,

Circuit Judges.

Appeal by the United States from the dismissal, by the United States District Court for the Southern District of New York, Honorable Marvin E. Frankel, *Judge,* of a complaint for the forfeiture and destruction, pursuant to 19 U.S.C. §1305, of certain allegedly obscene material imported from abroad.

Reversed and remanded.

FREDERICK P. SCHAFFER, Assistant United States Attorney, New York, New York (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and Stuart

I. Parker, Assistant U.S. Attorney, of counsel), *for Appellant.*

JOEL M. GORA, Esq., New York, New York (American Civil Liberties Union; and Wayne N. Outten, New York University School of Law, of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

The Congress, obviously believing that it was reflecting the opinion of its collective constituencies throughout the Nation, has enacted a statute under the title of "Immoral articles; importation prohibited". 19 U.S.C. §1305. Listed under (a) thereof is a curious assortment of immoral articles, *e.g.*, those writings "advocating or urging treason or insurrection against the United States"; obscene publications; drugs for causing unlawful abortions; and lottery tickets. Entry of such articles into the United States is prohibited. The entire contents of any package containing a prohibited article are subject to confiscation "unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the . . . consignee. . . ." Additional censorship beyond some employee of the customs office is granted to the Secretary of the Treasury, who when not engaged in the fiscal affairs of the Nation may, in his discretion, read the books declared by customs to be obscene to decide whether they are "classics or books of recognized and established literary or scientific merit". If he so finds, he may admit them as long as they are only imported for "noncommercial purposes".

The procedure prescribed is equally interesting. The customs employee is directed to seize the in-his-opinion

offending article to wait the judgment of a district court thereon. To this end, the customs employee must transmit the article "to the district attorney of the district in which is situated the office at which such seizure has taken place", and he, undoubtedly through one of his assistants, "shall institute proceedings in the district court" for the confiscation and destruction of the matter seized.

Some Assistant United States Attorney prepares a complaint whereby he demands judgment that the article is obscene and declares that he wants it destroyed. He attaches a schedule of all seized items (usually a week's collection) and prays that all interested persons be duly cited to answer. To all addressees he then sends a notice, giving them 20 days in which to file a claim, together with a form for such claim and answer. Upon receipt of such claims, if any, the matter is set for a so-called hearing before a District Judge. The notice to the addressees does not appear to advise them of their right to a trial by jury, but this right can be claimed.

The institution of court proceedings adds to the two primary censors, the customs employee and the Assistant United States Attorney, a District Judge and, potentially, three Court of Appeals Judges and nine Supreme Court Justices.

Against this procedural background, we turn to the facts of the case before us.[1] A young factory worker, a resident of Lancaster, Pennsylvania, had a friend in Germany who, knowing of the American's interest in matters pornographic, sent him, unsolicited, the pamphlet seized by customs (hereinafter referred to as Exhibit 8). Exhibit 8 consist of a dozen or more pages, in color, of a young man and two young women, in varying combinations, en-

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1 It is the duty of the courts to make "an independent review of the facts of each case". *Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1964).

gaged in diverse postures of sexual acts. To avoid offending readers by using the English equivalents, the courts generally describe some of the acts by the Latin words *fellatio* and *cunnilingus*—testimony to the fact that the Romans, as undoubtedly the Greeks, Egyptians and Assyrians before them, were quite familiar with these practices.[2] Since the customs officer did not inquire whether Exhibit 8 was shipped without the knowledge or consent of the consignee, we will assume that he would at least have been a willing recipient. Indeed, the young man from Lancaster later testified that he found the pictures of the type in Exhibit 8 more "entertaining" than watching football or baseball games. App. at 147-48.

Not surprisingly, Exhibit 8 was seized by the customs officer at the port of entry, namely, New York City. It was one magazine among a large number (over 500) of printed articles seized by customs officials at the time, all of which were listed in the same complaint filed in the district court. Schedule 1303, attached to the complaint and listing the articles seized as well as the mailing destinations, includes some 573 addressees located in some 48 states. Of the 50 states, only 2, Colorado and North Dakota, failed to have residents exhibiting some "prurient interest", or at least curiosity. Most of the items seized were listed only as "Illustrated Advertising". The titles of the other so-called magazines were "Weekend Sex", "Nympho", "Children Love", "Anal Sex", "Sexual Positions", and similar designations.

The addressees were duly notified of the seizure of their intended materials. A few of the comments made by those who replied are interesting: "I intend to fight for my

2 It would appear that as early as the twin cities of Sodom and Gomorrah communities were establishing their own local standards of sexual conduct.

right to choose my own reading material without Government censorship"; "I resent that anyone is censoring my mail. . . ." App. at 81, 97.

Of the 573 addresses, only 14 filed claims seeking release of the materials addressed to them. None of these fourteen were residents of the Southern District of New York. And only a doctor in California successfully convinced the Government to release the material addressed to him. He was the recipient of 19 magazines, including "Sex Art", "Nympho", and others. The Assistant United States Attorney apparently singled him out to inquire whether the 19 magazines were ordered "solely in connection with your medical practice". The doctor, a specalist in Obstetrics and Gynecology, replied that he had ordered the magazines "solely in connection with my gynecological practice . . . to see if they would be useful in counseling patients with sexual problems". He did not foreclose the possibility that he might "personally become titillated if [he] should look at these representations", App. at 95, but his reasoning apparently satisfied the censors and he received his magazines. It may be asked why a diplomate in his field would need the 19 magazines when his lack of knowledge might have been remedied by the *Kama Sutra* or *The Joy of Sex*, which has been on *The New York Times* list of best sellers for months.

At the trial, only the Lancaster claimant, *pro se*, and an Assistant United States Attorney appeared. The claimant testified that the Mayor of Lancaster, not knowing precisely how to formulate a local policy regarding pornography after then-recent Supreme Court decisions [presumably *Miller* v. *California*, 413 U.S. 15 (1973), and related cases], had "selected some citizens to try and formulate some sort of basis to go on of what the city should do dealing with obscene material". App. at 148.

The claimant was himself a member of the resulting Lancaster Advisory Committee on Community Standards on Pornography. He produced a copy of a Lancaster newspaper which purportedly summarized the Committee's conclusion that "since [Lancaster] has tolerated restricted and X-rated movies to be shown, community standards have been acknowledged". The Committee recommended an end to all controls on pornography except where children were involved. App. at 148-49; Exhibit A.[3]

Asked by the Court whether he desired to state his position, the claimant made one final comment, revealing rather sagacious consideration of the problem, saying "that it seems unusual for the United States Government to spend an awful lot of time and money and effort for one small mail article . . . when there is obviously better use for that money to be spent in the judicial system . . ." App. at 154. He then added that similar matter was available in New York and anywhere else in the country, a fact of which the Court could fairly have taken judicial notice.[4]

The District Court, during the hearing, stated that "the interest of justice would be better served by a lawyer's presentation on both sides rather than your [claimant's] handling this for yourself as a layman" and suggested that claimant seek assistance from the American Civil Liberties Union (ACLU) or a member of a law faculty. App. at 157.

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3 There is no reason to believe that the views of the Mayor's Committee fully reflected "contemporary community standards" or that the Committee was any more qualified to do so than a judge or jury. *See Smith* v. *United States*, 45 U.S.L.W. 4495, 4499 (U.S. May 23, 1977).

4 Judges in metropolitan areas en route from their homes to their ivory towers, when purchasing their morning newspaper, cannot be unaware of the burgeoning number of pornographic magazines (a score or more) on the newsstands. Furthermore, judicial notice can be taken of the fact that every large city has its adult movies and book-store enclaves, some of which seem to reach out to the countryside as well.

With the same enterprise shown by his coming to New York to make his claim, the claimant has obtained aid from both. Thus, the District Court had the benefit of legal representation of claimant—as do we on appeal, for the ACLU and an attorney from the New York University School of Law have filed a substantial brief.

In its opinion, the District Court was genuinely concerned about the opening of mail by customs agents without prior judicial approval, though this issue was "bypassed" in view of the decision on other grounds. App. at 165-66. The Supreme Court has since resolved any doubts about the propriety of the customs agents' actions. *United States* v. *Ramsey*, 45 U.S.L.W. 4577 (June 6, 1977). The District Court addressed itself primarily to the propriety of §1305's procedure for determining whether the magazine mailed to the claimant was obscene. Specifically, the Court inquired as to which community's standards were to be applied by the appropriate fact-finder, *i.e.*, whether a court or jury at the port of entry should determine obscenity or whether that issue could properly be handled only by a fact-finder drawn from the locale of the addressee.

After considering a large number of reported cases, the Court reasoned that it was not for a judge or jury in the "happenstantial port of entry to become the arbiter of taste and decency for recipients of mail everywhere". App. at 17. Therefore, the Court concluded that obscenity should be determined by a fact-finder in the district of the claimant's residence "under the standards of the community to which the questioned mail is addressed". App. at 172.

The Court thereupon held that §1305(a) offends the First Amendment "in (a) depriving claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and

expensive procedure for the vindication of First Amendment claims to items seized".[5] App. at 175. The Court believed that the procedural invalidity could be eliminated "by stating in the notice to potential claimants that they have a right to have the issues heard in the district of their residence or of the destination of the mail matter". App. at 176. The Court found that because no such notice had been given to the claimant "his claim should be sustained without reaching the merits of the issue of obscenity", but stated as an alternative ground for dismissal the Government's failure to prove the material "obscene within the local community standard of Lancaster, Pennsylvania". App. at 176.

From this decision the Government appeals, asserting as error the Court's holdings: (1) that applicable community standards of obscenity should be those of the addressee's residence, and (2) that the claimant had the right to have his claim referred to the district of his residence or that of the article's destination.

Were we drafting new legislation on the subject, we would find the District Court's delineation of the problems attendant thereto quite accurate—but we are not. Our task in this case is limited to interpreting and enforcing the statute reflecting Congress's (and presumably the People's) will. Importation of an obscene pamphlet or picture is prohibited. Import implies entry into the country. Entry, of necessity, must be made at specific places, referred to as ports of entry. These ports of entry are manned by

5 By contrast, in *Roth* v. *United States*, 354 U.S. 476 (1957) and subsequent cases, *see Smith* v. *United States*, *supra*, the Supreme Court held that 18 U.S.C. §1461, proscribing "[e]very obscene, lewd, lascivious, indecent, filthy or vile article" does not offend the guarantees of the First Amendment. The District Court's focus on the individual's burden under the Government's procedures for implementing 19 U.S.C. §1305 was derived from *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

customs officers who are the only persons on the premises available to make a decision. In fact, the statute provides that seizure shall be made by "the appropriate customs officer". Congress must have known when enacting the statute that there were not customs officers in every city, town and hamlet of the United States. Therefore, inspection would have to take place at the port of entry—in this case, New York. Thereafter, judicial proceedings are to be conducted in "the district in which is situated the office at which such seizure has taken place", here, the Southern District of New York. Nothing in the statute, by implication or otherwise, indicates or justifies reference for adjudication to the district of the addressee's residence. Interesting though such a procedure might be to the prosecutors and judges in the hinterland, it would be without statutory authority.

As for applying "local community standards", even greater practical obstacles arise. Obviously, the rules with respect to selection of jurors would prohibit bringing twelve jurors from Lancaster to New York. Query, in any event, whether residents of Lancaster could properly testify as experts (in the manner of presenting foreign law) with respect to their local *mores*. Furthermore, the statute does not make them the censors; it designates only the customs employee, the United States Attorney (undoubtedly an Assistant), and the courts.

Moreover, as for obscene foreign imports, the Supreme Court decision in *United States* v. *12 200-Ft. Reels of Super 8 MM. Film*, 413 U.S. 123 (1973), in construing §1305, not only held that the claimant had no First Amendment right to import obscene materials for private use, but pointed out that import restrictions and searches of packages at the national borders "rest on different considerations and different rules of constitutional law from domestic reg-

ulations". 413 U.S. at 125. The Court acknowledged the "plenary power" of Congress to prevent imports and, quoting from *Weber* v. *Freed*, 239 U.S. 325, 329 (1915), emphasized the "complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles. . . ." 413 U.S. at 126.

Miller v. *California*, 413 U.S. 15 (1973), was undoubtedly written with the well-intentioned purpose of clarifying obscenity standards once and for all. The scores of cases cited to us and the District Court's statement that "there has been no consensus among the lower federal courts as to which community's standards *Miller* meant to tap", App. at 169, embolden us, though with some trepidation, to suggest that much of the difficulty arises from the use of the expression "community standards". *Miller* itself recognized that "the absence, since [*Roth* v. *United States*, 354 U.S. 476 (1957)], of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts". 413 U.S. at 29. Indeed it has. There is no point in reviewing the many cases on the general subject. As the Supreme Court seemed to suggest in *Miller*, concentration should be on the facts of each case, allowing a moderate, common sense approach.

In reality, no judge or jury can be expected to determine "community standards" with respect to Exhibit 8. *See Smith* v. *United States*, 45 U.S.L.W. 4495, 4501 and note 10 (May 23, 1977) (dissenting opinion of Justice Stevens). The best that anyone can do is to give his or her personal reaction to it. No juror or judge armed with a copy of Exhibit 8 will have the opportunity to rush up and down the streets of his community asking friends and neighbors how they feel about it.[6] Nor should they rudely

6 Even this method of trying by such a survey to ascertain the community's reaction might not be entirely determinative. In *Hamling* v. *United States*, 418 U.S. 87 (1974), a survey of San Diego residents

seek insights into community *mores* by asking others what their intimate sexual practices may be. Yet the fiction remains that a jury is somehow capable of reflecting or determining "community standards". This is so probably because there is simply no better method for applying this test.

It is unfortunate, as has been reiterated countless times by many judges, that these matters have to come before the courts. But the law is on the books and someone must enforce it. We are now concerned only with importation and the law applicable thereto. As we would summarize the law, the customs employee had a right to open the mail and to exercise his discretion in declaring Exhibit 8 obscene; the United States Attorney was under a duty to issue a complaint for confiscation and destruction; the complaint was properly issued in the district of the seizure; and the determination thereof properly made in that district. Conversely, the claimant has no right to have the case transferred to, or heard in, the district of his home.

Since we believe that the law in its present state differs from the District Court's fundamental premises that the claimant has a right to have the issues heard in the district of his residence and that the Government was under a duty to prove that Exhibit 8 is obscene within the local community standards of Lancaster, Pennsylvania, we must reverse and remand to the Court for a determination by it in the Southern District of New York as to whether Exhibit 8 is obscene.

The Government's case consists solely of Exhibit 8, which, it says, speaks for itself—in effect a *res ipsa loquitur* doctrine. The Supreme Court gave credence to this doc-

with respect to the brochure in question was excluded by the trial judge. The exclusion was affirmed by the Supreme Court. 418 U.S. at 127. Yet if "local" standards be the test, such proof would seem to have been highly relevant.

trine in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964). It had viewed the film in question, "Les Amants", and declared it "not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *California* . . . ." 378 U.S. at 196. Again in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974), the Court used its own visual reaction as its standard, saying:

> "Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." 418 U.S. at 161.

Mr. Justice Stewart emphasized his approach in his comment: "I know it when I see it. . . ." *Jacobellis, supra*, at 197 (concurring opinion).[7]

Although the legal issue in *Smith* v. *United States, supra*, was somewhat different from that presented here, that case's interpretation of *Miller* v. *California, supra*, is pertinent. The *Miller* standards, albeit stated as " 'basic guidelines' for the trier of fact in a state obscenity prosecution", were held to be "equally applicable to federal legislation." 45 U.S.L.W. at 4497, *quoting Miller, supra*, at 24.[8] In summary, the Court decided that a jury [in this case the District Court] in deciding "contemporary community standards" is entitled to rely on its own knowledge of community standards to decide "the questions of appeal

7 *Jacobellis* assumes greater significance when it is realized that Jacobellis was convicted by a court of three judges (a jury trial having been waived), and the conviction was affirmed by an intermediate appellate court and the Supreme Court of Ohio. Thus, the only question was whether this substantial group of state judges had properly found the film to be obscene. They obviously had all seen the film and had concluded that it was obscene. The Supreme Court, however, concluded otherwise.

8 In *Smith*, the federal statute was 18 U.S.C. §1461; here it is 19 U.S.C. §1305.

to prurient interests and patent offensiveness". 45 U.S. L.W. at 4498.[9]

On remand the District Court will have to follow the Supreme Court's injunction that "contemporary community standards must be applied . . . in accordance with [the District Court's] own understanding of the tolerance of the average person in [its] community", and that it "consider the entire community and not simply [its] own subjective reactions, or the reactions of a sensitive or of a callous minority." *Smith* v. *United States, supra*, at 4498-99.

In *United States* v. *One Reel of 35 MM Color Motion Picture Film Entitled "Sinderella", Sherpix, Inc.*, 491 F.2d 956 (2d Cir. 1974), the Government's case, as here, consisted solely of placing the material in evidence and exhibiting it to the Court. On remand we can only say, as we did there, that the Judge, as the trier of fact, must

> "decide as a matter of fact whether the *Miller* 'basic guidelines' have been met . . . . His task [is] to gauge

9 The *Miller* guidelines were set forth in *Smith* as follows:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 45 U.S.L.W. at 4497, *quoting* 413 U.S. at 24.

These guidelines were embellished by "plain examples" from *Miller*, namely:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 45 U.S.L.W. at 4497, *quoting* 413 U.S. at 25.

the reaction of the community when, as and if it viewed [Exhibit 8]." 491 F.2d at 958.

The District Court will have to serve as a composite for a Southern District jury—possibly representing the rural areas of Rockland and Dutchess Counties together with the urban sections of Manhattan and the Bronx.[10] The Court will have to decide the question of obscenity "according to the average person in the community, rather than the most prudish or the most tolerant". *Smith* v. *United States, supra,* at 4498. Thus, the "average person" takes his or her stand beside the hypothetical and court-created mythical character "the reasonably prudent man". *See id.; Hamling* v. *United States,* 418 U.S. 87, 104-105 (1974). Again, there is probably no better way.

Shades of Anthony Comstock[11] still hover over our obscenity statutes. But as long as they remain on the books it is the duty of Government to enforce them within constitutional limits.

Reversed and remanded for further proceedings in accordance with this opinion.

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10 Despite this technical jury selection limitation, the Supreme Court in *Hamling* v. *United States,* 418 U.S. 87 (1974), said:

> "But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." 418 U.S. at 106.

By a parity of reasoning, a judge would be similarly permitted to draw upon his own knowledge of community reaction beyond the District's territorial boundaries.

11 Zealot leader of the New York Society for Suppression of Vice around the turn of the century (b. 1844 d. 1915).

MULLIGAN, *Circuit Judge* (concurring):

I concur in the judgment of reversal. Judge Frankel found that the procedure set forth in 19 U.S.C. § 1305(a) offended the First Amendment because it deprived the claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene. However, here the claimants have imported into the United States matter which is allegedly obscene and the criterion of obscenity to be applied is a federal question. This distinction was emphasized in *Smith* v. *United States,* —— U.S. ——, 97 S. Ct. 1756, 1768 (1977), decided after the opinion of the district court was filed.

> Just as the individual's right to possess obscene material in the privacy of his home, however, did not create a correlative right to receive, transport or distribute the material, the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State.

Therefore, the issue of whether the material is in violation of 19 U.S.C. § 1305(a) is clearly not to be determined by the Mayor's Committee of Lancaster, Pennsylvania or even the legislature of the Commonwealth of Pennsylvania but by the Congress which concededly has "plenary power" to proscribe the importation of obscene material. *United States* v. *12 200 ft. Reels of Super 8 mm. Film,* 413 U.S. 123, 126 (1973).

The offense is the importation of the material, not the reading of it. The statute here evinces a clear congressional intent that the venue for the judicial determination

of the obscenity of the imported material shall be the port of seizure. It logically follows that the community standard must be that of the situs of the court and not that of the residence of the addressee. Congress may determine "what articles may be imported into this country and the terms upon which importation is permitted." *Board of Trustees of the University of Illinois* v. *United States,* 289 U.S. 48, 57 (1933). That this congressional determination may increase the expense or inconvenience of the claimant in contesting the seizure does not result in any constitutional infirmity. Cf. *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Ortwein* v. *Schwab,* 410 U.S. 656 (1973). See also *Person* v. *Association of the Bar,* 554 F.2d 534 (2d Cir. 1977).

I therefore agree with the majority that the only community standard which can be applied is that of the Southern District of New York. The finder of fact, however, is not free to determine the issue on the basis of his personal, idiosyncratic reaction to it. "[J]uries must be instructed properly so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority." *Smith* v. *United States, supra,* —— U.S. at ——, 97 S. Ct. at 1766. How difficult the determination of this issue will be obviously depends upon how blatantly offensive the material may be. See *United States* v. *Cangiano,* 491 F.2d 906, 914 (2d Cir. 1976). I cannot agree that it is "unfortunate" that these matters have to come before the court. It is unfortunate that the hard core pornography industry is apparently flourishing despite the efforts of national, state and local communities to curb it. When violations of the restrictions against pornography occur it is the duty of the prosecutor to enforce the law and the courts to apply it. I see no reason to flinch from the exercise.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States Court of Appeals
For The Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of September, one thousand nine hundred and seventy-seven.

Present: Hon. Leonard P. Moore
Hon. J. Joseph Smith
Hon. William H. Mulligan

Circuit Judges,

United States of America,
Plaintiff-Appellant

v.

Various Articles of Obscene Merchandise Schedule No. 1303,
Defendant-Appellee.

76-6152

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIAL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

ORDER - UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States Court of Appeals
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of November, one thousand nine hundred and seventy-seven

Present: HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. WILLIAM H. MULLIGAN
Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE NO. 1303, Defendant-Appellee	76-6152

A petition for a rehearing having been filed herein by counsel for the defendant-appellee

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

ORDER - UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of November, one thousand nine hundred and seventy seven.

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UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE NO. 1303,

Defendant-Appellee

DOCKET NO. 76-6152

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Chief Judge
IRVING R. KAUFMAN